BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
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Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
	)	
Cable Home Wiring	)	

PETITION FOR RECONSIDERATION

TIME WARNER CABLE

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December 15, 1997

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SUMMARY

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits this petition for reconsideration of the Commission's Order adopting new inside wiring procedural rules concerning the disposition of "home run" wiring inside multiple dwelling unit buildings ("MDUs"). In adopting these new rules, the Commission erred as a matter of law and policy in many important respects. The Commission should now either reconsider its adoption of these new procedural rules and/or further amend the inside wiring rules to address the following concerns:

- The procedural rules adopted by the Commission in the Order should not apply in any state which has enacted a mandatory access statute to assure that MDU residents are able to obtain service from a franchised cable operator. Pursuant to such mandatory access laws, an incumbent cable operator always has a legal right to maintain cable facilities within an MDU against the will of an MDU owner, and therefore a fundamental prerequisite of the Commission's new rules can never be met.

- The Commission's treatment of mandatory access statutes under the new rules effectively nullifies them, directly contradicting the Commission's promise not to destroy or diminish incumbents' existing legal rights under state law. In order to provide clarity and to avoid unnecessary disputes and litigation, the Commission should now clearly state that the new rules do not apply in any state with a mandatory access statute.

- At the very least, the building-by-building alternative under the Commission's new procedural rules must never apply in any state with a mandatory access statute. This alternative makes no sense in mandatory states, because MDU owners in such states have no legal authority to exclude franchised cable operators on a building-wide basis.

- The Commission has repeatedly stated that its fundamental policy goals in this proceeding are to promote MDU video service competition and MDU resident video service choice. The record in this proceeding clearly demonstrated that MDU residents are often denied the benefits of competition because they have very little choice, if any, among competing video service providers, primarily because of the ability of MDU owners to act as bottlenecks by restricting MVPD access to their buildings. The Commission should now tackle the bottleneck power of landlords head on by incorporating specific incentives for MDU owners to act in the best interest of their residents.

  -- Any procedures regarding the disposition of MDU home run wiring should apply only where the MDU owner agrees to allow unit-by-unit competition among competing MVPDs.

-- To ensure that MDU owners make their decisions as to which MVPDs are allowed to offer service to MDU residents based upon the best interests of such residents, such procedures should not apply where the MDU owner has received any excess consideration from an MVPD in exchange for exclusive access to the building.

- The Commission has stated its intent in this proceeding to both protect incumbent providers' property rights and to reduce the amount of litigation surrounding MDU wiring issues. In order to assure that valid property rights are respected, the 45 day requirement to obtain a court ruling in order to preserve an incumbent's legal rights should be abolished. Instead, it should be sufficient for an incumbent provider to file for an injunction or other judicial relief within 30 days of the receipt of a termination notice from an MDU owner.

- Under the building-by-building transition rules adopted in the Order, the Commission adopted a rule that after receipt of a termination notice from the MDU owner, if an incumbent elects to sell the wiring to the MDU owner (or alternative MVPD) but the parties have been unable to agree upon a price for the wiring, they can both agree to submit the pricing issue to binding arbitration. Because the MDU owner can unilaterally reject arbitration at the end of this negotiation period, and thereby force the incumbent provider to elect one of the only two remaining options, to abandon or remove its wiring from the building, this rule unfairly tilts the process in the favor of the MDU owner, thereby increasing the likelihood that the incumbent provider will be deprived of fair compensation for its wiring. Instead, the MDU owner should be required to agree to an ultimate determination by an arbitrator prior to the time that negotiations begin.

- The Commission should amend its rule such that whenever an incumbent is forced to allow additional home run cables to be installed within its moldings, the parties should be required to negotiate in good faith regarding reasonable compensation for such uses. Where such compensation cannot be agreed upon, the Commission should, upon submission of an appropriate petition, determine the rate in accordance with the principles applicable to cable television use of utility conduits. Alternatively, the parties should be entitled to submit the matter to arbitration.

- Open Video System ("OVS") providers should not be eligible to utilize the new procedural rules because they are legally required to construct end-to-end facilities all the way to end user MDU residents, and therefore have no basis to claim the right to use pre-existing MDU home run wiring. Such a restriction is essential to assure that unaffiliated OVS programing providers can be guaranteed *bona fide* access to and use of the OVS system to provide service to end user MDU subscribers of the OVS system.

- The Commission should now amend the new rules to include a outright prohibition against unauthorized switches by purported subscriber agents ("slamming") before widespread abuses develop. The Commission should not allow either the MDU owner or the competing MVPD to act as the agent of the MDU resident unless the incumbent MVPD has expressly agreed to such an arrangement and the customer has authorized the agent in writing. Slamming should lead to monetary sanctions against the masquerading agent such

that it is fully responsible for the accrued monthly service charges between the time the subscriber's service was terminated, and the time that the agent notifies the former provider of the switch.

Adoption of these changes to the Commission's new inside wiring rules would assist the new rules have the desired effect, to bring increased video service competition and subscriber choice to residents of MDUs.

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PETITION FOR RECONSIDERATION

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits this petition for reconsideration of the Commission's Report and Order and Second Further Notice of Proposed Rulemaking (hereinafter the "Order") in the above-captioned proceeding.[1] In the Order, the Commission adopted new inside wiring procedural rules concerning the disposition of "home run" wiring inside multiple dwelling unit buildings ("MDUs") extending from the lockbox or multitap to the point of demarcation for each individual unit. These new procedures apply when an existing MVPD no longer has a right to serve an MDU or retain its home runs on the MDU premises, and the MDU owner elects either to provide exclusive access to the existing home runs to an alternative MVPD, or where the MDU

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[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. October 17, 1997). The Order was published in the Federal Register on November 14, 1997, 62 Fed. Reg. 61,016 (1997), and thus pursuant to 47 CFR §§1.4(b), 1.106(f), this Petition is timely filed.

owner intends to allow multiple MVPDs access to the MDU to compete on an unit-by-unit basis to provide video service to individual subscribers. In adopting these new rules, the Commission erred as a matter of law and policy in many important respects. As discussed in detail below, the Commission should now either reconsider its adoption of these new procedural rules and/or further amend the inside wiring rules to address the following concerns.

I. The New Procedural Rules Should Not Apply In Mandatory Access States.

The procedural rules adopted by the Commission in the Order should not apply in any state which has enacted a mandatory access statute to assure that MDU residents are able to obtain service from a franchised cable operator. Pursuant to such mandatory access laws, an incumbent cable operator always has a legal right to maintain cable facilities within an MDU, and therefore a fundamental prerequisite of the Commission's new rules can never be met. Furthermore, the Commission's treatment of mandatory access statutes under the new rules effectively nullifies them, directly contradicting Commission's stated intent not to destroy or diminish incumbent's existing legal rights under state law. Accordingly, in order to provide clarity and to avoid unnecessary disputes and litigation, the Commission should now clearly state that the new rules do not apply in any state with a mandatory access statute.

A. The Commission's Interpretation Of State Mandatory Access Statutes Is Incorrect.

In the Order, the Commission claims that the applicability of state mandatory access laws is unclear, and therefore the new rules will be "presumed" to apply in mandatory access states unless a state's highest court has found that the incumbent always has an enforceable right to maintain its home run wiring on the premises. In its discussion of the applicability of the new

procedures, the Commission discounts the protection these statutes afford cable operators to maintain their wiring in MDUs against the will of MDU owners:

> We are unwilling to conclude that state mandatory access statutes always grant incumbents the right to maintain their home run wiring in an MDU over the MDU owner's objection. Contrary to the arguments of some cable operators, this is not an issue of the right to install wiring. Rather, the issue is whether the incumbent has a legally enforceable right to maintain its home run wiring on the premises over the objection of the MDU owner. Accordingly, our procedures will apply in mandatory access states to the extent state law does not permit the incumbent to maintain its home run wiring (in the case of a building-by-building disposition) or a particular home run wire to a particular subscriber (in the case of a unit-by-unit disposition) against the will of the MDU owner.[2]

While the Commission acknowledges that state mandatory access statutes grant cable operators the right to initially install wiring, it also asserts that these same statutes somehow do not permit cable operators to maintain their wiring in those same MDUs unless they have entered into a contract with the MDU owner and the contract has not expired.

Such an analysis is contrary to the fundamental purpose of mandatory access statutes. Under a rational reading of any mandatory access statute, the right to install wiring in an MDU against the wishes of an MDU owner also conveys an undeniable right to maintain that wiring in the building so long as the operator holds its cable franchise. Any contrary analysis, including the Commission's assertion that the right to maintain wiring in a mandatory access state is somehow preconditioned on an underlying contractual relationship between the cable operator and the building owner, emasculates the operation and intent of such laws.

Most mandatory access statutes straight-forwardly state that owners of MDUs shall not interfere with the installation of cable television facilities upon their property, or that residents of MDUs shall not be denied access to any available franchised or licensed cable television service, and thereby allow cable operators to install and maintain broadband facilities in MDU buildings.

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[2]Order at ¶ 79.

For example, in New York, under Section 228(1) of New York's Public Service Law, once cable facilities are installed in an MDU pursuant to the access provision, the cable operator retains the right to maintain all of its wiring throughout the building, even those home runs installed to serve individual dwelling units where the current occupant has not elected to subscribe to cable service.[3] The right of a franchised cable operator to install facilities includes the right to maintain its facilities intact and free from interference on the premises after installation.[4] This is why the New York Department of Public Service, the government entity charged with regulating cable television service in New York, argued in this proceeding that the new rules "should not apply to any entity that has installed facilities in an MDU building pursuant to a state right-of-access statute."[5]

Likewise, Pennsylvania law expressly states that the operator who installs cable facilities pursuant to the access provision shall retain ownership of all such wiring and equipment in an MDU.[6] Under Pennsylvania's mandatory access statute, a tenant has the right to request and receive CATV service, and a landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring CATV service from an operator of the tenant's choice, provided that the

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[3]See 86th Street Tenants Corp. v. New York State Comm'n on Cable Television, 627 N.Y.S.2d 693, 694-95 (A.D. 1 Dept. 1995) (upholding the NYSCCT's interpretation of New York's cable access statute as authorizing building-wide rather than piecemeal installation); see also Petition of Manhattan Cable Television, Inc., Order of Entry, Docket No. 80296, at 2 (NYSCCT, rel. January 14, 1993).

[4]The constitutionality of the New York mandatory access statute (then codified at Section 828 of the Executive Law) was established in Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981) rev'd on other grounds, 458 U.S. 419 (1982), on remand, 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983) ("Loretto"). Indeed, in Loretto, the Supreme Court recognized that the access law requires a building owner to permit the cable facilities to remain on its property: "So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it." Loretto, 458 U.S. at 439. Thus, the Commission's new MDU inside wiring rules are clearly inapplicable in New York State.

[5]New York Department of Public Service Further Comments at 2.

[6]See 68 P.S. § 250.503-B *et seq.*

operator compensates the landlord in a manner prescribed by the statute.[7] The statute also grants to operators whose service has been requested an ongoing right of access to the building "for the purpose of constructing, reconstructing, installing, servicing or repairing CATV system facilities," and goes on to provide that the "operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises."[8]

A cable operator's dual rights to install and to maintain its facilities under a mandatory access statute can not be separated as the Order seems to suggest. A right to install simply has no meaning, if upon completion of installation, an MDU owner has a contrary right to require that the wiring be immediately removed.[9] If a mandatory access statute grants a cable operator the right to install wiring in an MDU without the consent of the MDU owner, that right obviously includes a commensurate right to maintain the installed wiring in the MDU without the consent of the MDU owner in order to provide service to the building's residents on an on-going basis. The clear meaning of such a right is that a cable operator need not enter into any type of contract with, or otherwise obtain permission from, an MDU owner, and any federal requirement to the contrary in effect destroys the very operation of these statutes. Thus, because state mandatory access statutes always allow the incumbent cable operator a right to maintain its facilities in an MDU against the wishes of the MDU owner, the home run wiring disposition rules adopted in the Commission's Order cannot possibly apply to deprive cable operators of the exclusive right to use their home run wiring in such states.

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[7]Id.

[8]Id. (emphasis added).

[9]The Commission's rule raises the illogical threat that immediately after installation, the building owner can claim that the inside wiring is not appropriately on the premises, and thereby force a fire sale of that wiring and/or the MVPD to reinstall another set of home runs.

B. The Commission's Current Rules Destroy An Incumbents' State Legal Rights, Contrary To The Commission's Proclamation To Protect Such Rights.

The Commission has stated that "an incumbent's ability to rely upon any rights it may have under state law" shall not be preempted by the home wiring regulations.[10] Indeed, the Commission specifically stated that new rules

> would apply only where the incumbent provider no longer has an enforceable right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home runs on the property.[11]

But as they now stand, the Commission's rules purport to allow a cable operator in a mandatory access state to maintain its wiring in an MDU only so long as the MDU owner agrees to allow such wiring to remain. As explained above, such a requirement functionally renders such statutes meaningless, and thereby infringes upon the very rights that the Commission claimed to protect.

The Commission has determined that a state mandatory access law should be presumed to not be effective against its new home wiring rules unless the highest court in a state has found that the statute preserves a cable operator's right to maintain facilities on MDU property against the wishes of landlords. This approach is exactly backwards, and stands the notion of a presumption on its head. The general principle is that a law, enacted by a legislature, should be presumed valid and enforceable unless a court has declared otherwise. Even then, a lower court should not be assumed to have the final word on a statute's validity. Thus, the rational way to have a presumption work is that state access laws should remain fully effective and not be "trumped" by the Commission's inside wiring rules.

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[10]Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. August 28, 1997) ("Further Notice") at ¶ 34. The Commission did not abandon this goal in adopting the final rules. Order at ¶ 69.

[11]Id.

Moreover, the Commission's presumption is backwards for another obvious reason. The validity of a state access to premises law might never be challenged. For one thing, it is routinely the case that many laws are never subject to judicial review. Such cases are expensive to bring and face the difficult hurdle that the challenged laws are presumed valid. In this case, it is even less likely that someone would challenge access to premises legislation because the body of law in this area, including clear precedent from the United States Supreme Court, has made clear the parameters for an enforceable statute. For another thing, there is no logical procedural means to obtain the result (a decision from the State's highest Court) the Commission seeks. An MVPD is obviously not going to bring a lawsuit to have an access to premises law declared valid. Nor will a building owner ever appeal a lower state Court decision that such a law is valid to the State's highest Court. To do so would potentially set aside the Commission's presumption that building owners will own the home runs. In sum, despite the Commission's clearly stated policy against pre-empting state rights, the Commission's requirement that there be a ruling of legality from the highest state court is tantamount to a full preemption of various state mandatory access statutes. The Commission simply cannot require cable operators to obtain declaratory rulings from the highest state court in each mandatory access state in order for such statutes to fulfill the intent of the legislatures which enacted them.

A federal regulatory policy forcing service providers to cede control over wiring that is protected under state law must be reversed. Any regulation that directly conflicts with existing state law in such manner has a preemptive effect, which is contrary to the Commission's stated intent not to enact any rules that apply when the incumbent provider still has existing legal rights to its cable wiring. Moreover, the Commission's determination that a valid state law will essentially be presumed invalid absent a ruling from the highest court in the state is in itself arbitrary and capricious. At a very minimum, there is no reason why a lower state court ruling should not be

deemed controlling unless and until reversed by a higher court. Similarly, there is no reason why a ruling from a federal court confirming that a state mandatory access statute allows incumbent cable operators to maintain their facilities in MDUs against the will of the MDU owner should carry any less weight than a state court ruling.

C. The Building-by-Building Option Should Not Be Available in Mandatory Access States.

As explained above, the Commission's new MDU inside wiring rules should not apply in any state which has enacted a mandatory access statute. At the very least, however, the building-by-building alternative under the Commission's new procedural rules must never apply in such states. Application of the building-by-building option is pre-conditioned on the conclusion that an MDU owner has the legal right to limit access to its building to a single provider, e.g., by evicting the franchised cable operator and granting a new MVPD the right to provide service to the building's residents. In the context of a non-mandatory access state, because an MDU owner may indeed have the right to exclude a franchised cable operator from access to the MDU's residents, the rules are constructed so that at the time of the service switch, the new MVPD also takes control of the wiring by virtue of the MDU owner's election to employ the building-by-building option, assuming that the incumbent has not elected to remove the home runs.

In a mandatory access state, on the other hand, the transfer of ownership of the building's home runs from an incumbent cable operator to an MDU owner is illogical and confiscatory. In such states, the condition necessary for the logical operation of the building-by-building alternative, that the MDU owner has the legal right to evict the franchised cable operator, runs directly contrary to the very purpose and effect of the state mandatory access statute itself, to guarantee every MDU resident access to the franchised cable operator. Accordingly, because an MDU

owner is legally barred by a mandatory access statute from excluding the franchised cable operator from the entire building, the building-by-building alternative should never apply in such a state.

Furthermore, if the building-by-building option applied in mandatory access states, it would only further undermine the effect of these laws by permanently denying the incumbent cable operators' ability to access MDU home runs. In any situation where the ownership of an MDU's home runs transfers from an incumbent cable operator to the MDU owner through sale or abandonment under the building-by-building rules, the incumbent cable operator could not regain the use of its home run even if a particular MDU resident requested to be reconnected to the former incumbent, because the inside wiring rules only apply if the home run wiring is owned by an MVPD, not the MDU owner. If, on the other hand, only the unit-by-unit rules applied in such a state, and a cable operator exercises its valid right to provide service to an MDU resident under the statute, at least it can always regain access to its home run by using the procedures established under the unit-by-unit alternative.

Accordingly, as the building-by-building alternative has no logical purpose in a mandatory access state, and would only serve to emasculate valid rights under state law, the Commission should clearly announce that the building-by-building alternative cannot be invoked in derogation of a franchised cable operator's rights under a mandatory access statute.

II. MDU Owners' Ability To Act As Bottlenecks To Competition Must Be Addressed.

The Commission has repeatedly stated that its fundamental policy goals in this proceeding are to promote MDU video service competition and MDU resident video service choice. The benefits to consumers of increased competition and choice in the video service arena have been extensively documented in numerous proceedings before the Commission, and these goals are no less valid in the MDU context. Regrettably, while the Commission has taken actions that may

benefit competitors, it has done little or nothing to benefit consumers because it has rejected proposals to enhance the ability of individual MDU residents to choose directly among MVPDs.

The record in this proceeding clearly demonstrated that MDU residents benefit when they can choose among multichannel video service providers. The record also clearly demonstrated that the real impediment to MDU video service consumer choice is not incumbent providers, but the ability of MDU owners to act as bottlenecks by restricting MVPD access to their buildings. Indeed, the evidence conclusively showed that MDU owners have an overwhelming incentive to restrict access to their buildings to the video service providers offering the greatest compensation to the MDU owners in exchange for such exclusive access. Rules which accomplish nothing more than displacing the incumbent MVPD in an MDU and allow a new MVPD to offer service under an exclusive contract may benefit the fortunes of alternative providers and property owners, but they do absolutely nothing to actually benefit MDU residents who will still be held captive to the self-serving whims of their landlords.

This problem was highlighted by the Media Access Project/Consumer Federation of America, which in its comments concurred that the underlying problem in MDUs is that "landlords have obstructed tenants' ability to choose among competing MVPDs," and that it cannot be assumed that landlords will represent their tenants' best interests in obtaining access to MVPDs because:

> Landlords are profit maximizers, and therefore would be more concerned with accumulating the greatest amount of revenue in return for the lowest risk of damage, long-term investment, or variable costs.[12]

Under both the former and current rules, MDU owners almost always act in their own economic interest rather than to enhance the competitive choices of MDU residents. In the end, MDU

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[12]See Media Access Project/Consumer Federation of America Further Comments at 9.

residents are still denied the ability to decide for themselves which video service provider would best serves their own interest, and are instead left with a service provider dictated by their landlord.

In the Order, the Commission could have structured the new rules to directly address the landlord bottleneck problem by incorporating disincentives for MDU owners to act in ways that do not promote tenant choice. Instead, the Commission glossed over MDU owners' role in hampering competition:

> We agree with those commenters that argue that MDU owners seek to maximize their profits, but disagree that this incentive always leads them to be willing and able to ignore their tenants' desires.[13]

Contrary to this assertion, the Commission's Order cites no credible evidence that MDU owners are in the best position to choose an MVPD for their tenants, rather than allow MDU residents to choose for themselves. To the contrary, substantial evidence was presented that replacement of the incumbent provider with a competitor often results in higher rates or less service.[14] While it may be true that MDU owners do not "always" act exclusively in their own selfish interests, the fact still remains that in the vast majority of cases, the primary factor considered in selecting an MVPD is the MDU owner's own pecuniary interest.

The Commission should now tackle the bottleneck power of landlords head on by incorporating specific incentives for MDU owners to act in the best interest of their residents. First, any procedures regarding the disposition of MDU home run wiring should apply only where the MDU owner agrees to allow unit-by-unit competition among competing MVPDs. Second, to ensure that MDU owners make their decisions as to which MVPDs are allowed to offer service to

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[13]Order at ¶ 61.

[14]See *ex parte* Letter from Thomas O. Might, Cable One, Inc. to William F. Caton, Acting Secretary, Federal Communications Commission, dated July 1, 1997, at 2.

MDU residents based upon the best interests of such residents, such procedures should not apply where the MDU owner has received any excess consideration from an MVPD in exchange for exclusive access to the building, over and above the amount paid as just compensation for the space occupied by the wiring.

A. The New Rules Should Only Apply Where An MDU Owner Allows Unit-By-Unit Competition, Not Building-By-Building Competition.

In the Order, the Commission adopted two separate procedural schemes for the disposition of MDU home run wiring which apply depending on whether the MDU owner chooses to allow a single MVPD to provide service within its building, or to allow multiple MVPDs access to the building to compete with each other on a unit-by-unit basis.[15] Of these two scenarios, clearly the second, where an MDU owner opens its building to multiple MVPDs, is the only option which truly leads to enhanced choice for MDU residents. While the Commission may be reluctant to require MDU owners to open up their buildings to MVPD competition, the Commission clearly can craft its rules to provide incentives for MDU owners to do so. In order to create incentives for MDU owners to allow unit-by-unit competition, the new procedures should apply only where the MDU owner agrees to allow unit-by-unit competition, and not where the MDU owner seeks to accomplish a building-by-building switch out.

Building-by-building transitions do not empower MDU residents to choose between providers, and the Commission itself expressly recognized that "subscriber choice would be enhanced by the use of multiple wires"[16] and that "in the unit-by-unit context, the MDU owner

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[15] Order at ¶¶ 39-80.

[16] Further Notice at ¶ 62.

would be expanding its residents' choices, not restricting them,"[17] an implicit admission that the building-by-building approach affords MDU residents "no choice at all."[18] Paradoxically, while it acknowledges that unit-by-unit competition would enhance subscriber choice and that "Congress intended for Section 624(i) to promote individual subscriber choice whenever possible,"[19] the Commission adopted rules that utterly fail to create incentives for MDU owners to allow multiwire competition inside their buildings. The approach adopted in the Order simply does nothing to address, much less alleviate, the problems caused by MDU owner bottleneck control over installation of multiple broadband distribution paths.

The Commission should now amend its procedural rules regarding the disposition of home run wiring so that they only apply in circumstances where an MDU owner voluntarily opens its building to multiple MVPDs. By so targeting its advantageous procedures, the Commission will be creating incentives for MDU owners to allow unit-by-unit competition, and thereby foster expanded choice for MDU residents among competing providers. Only when landlords are given disincentives from entering into new building-wide video service contracts will MDU residents begin to enjoy the benefits of unit-by-unit competition.

B. The New Rules Should Not Apply In Any Situation Where An MDU Owner Receives Kickbacks.

As described above, the record in this proceeding amply demonstrates that MDU owners' decisions are more often dictated by the level of consideration offered by the MVPD than by which MVPD offers the widest array of programming, most attractive prices, or best customer service. While MDU owners deny such crass economic motivations, there is one simple way for the

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[17]Id. at ¶ 47.

[18]Id. at ¶ 46.

[19]Id. at ¶ 81.

Commission to help ensure that consumer welfare is given top priority. The Commission's new home run disposition rules should not apply in any situation where the MDU owner has received any form of excess consideration from the MVPD seeking entry,[20] above and beyond the just compensation paid for allowing broadband distribution facilities to occupy the MDU property.[21]

Such a simple requirement will ensure that MDU owners seeking to take advantage of the beneficial procedural mechanisms embodied in the Commission's rules will make their choices regarding MVPD access to their buildings solely on the basis of the nature of the services and other benefits such MVPD will offer directly to MDU residents, not to the MDU owner. Such a requirement would divorce the MDU owner's own immediate economic interest in making the decision whether or not to allow competing providers access to its buildings. With no possibility of an economic windfall for the MDU owner, the only interests left for it to consider are those of its residents, specifically which provider delivers the best service, programming and price. Without an incentive to limit access, many landlords might even decide that the benefits of vibrant competition, providing a diversity of programming and price points, is well worth making available to their residents.

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[20]Similarly, the benefits of the new rules should also not apply in any situation where the MDU owner bundles service provided by the incoming MVPD with the rent. In such situations, the MDU owner is, in effect, reselling the MVPD service and can capture an undetected markup through a rent increase. The ability of MDU residents to choose alternative MVPDs, or even to decline MVPD service, is frustrated because the MDU resident is forced to pay for the MVPD service selected by the MDU owner whether the resident wants it or not.

[21]In New York, for example, state law requires franchised cable operators to provide MDU property owners just compensation for access to their building pursuant to the state mandatory access law. N.Y. Pub. Ser. L. § 228(1)(b).

Adoption of such a requirement would also produce what the Commission considers to be the best possible outcome.[22] By dislodging the MDU owner's incentive to act against the best interest of its residents in deciding which service provider shall be granted access to the MDU, such a rule would produce results that are less skewed by the ability of MDU owners to act as a bottleneck to competition. Moreover, incentives designed to promote unit-by-unit competition would empower MDU residents to make their own choices among competing video service providers.

III. Incumbent Providers Should Not Be Forced To Obtain An Injunction Within 45 Days Of Receiving A Termination Notice In Order To Toll The FCC Procedural Rules.

The Commission has stated its intent in this proceeding to both protect incumbent providers' property rights and to reduce the amount of litigation surrounding MDU wiring issues.[23] Furthermore, the Commission stated its desire not to create or destroy any presumptions regarding property rights.[24] Incongruously, in the Order, the Commission now requires an incumbent MVPD to obtain an injunction within 45 days of receiving a termination notice from an MDU owner in order to protect any legal rights it may have. Such a requirement effectively destroys any presumption of the validity of an incumbent's legal rights, and only serves to increase the likelihood of litigation. In order to assure that valid property rights are respected, the 45 day requirement should be abolished. Instead, it should be sufficient for an incumbent provider to seek an injunction or other judicial relief within 30 days of the receipt of a termination notice from an MDU owner.

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[22]Order at ¶ 62.

[23]Further Notice at ¶¶ 31, 34.

[24]Id. at ¶ 34.

If protection of the incumbent's property rights is to have any meaning at all, in any case where an incumbent's continued right, either to serve the property or retain its facilities on the property, is disputed, the procedures and deadlines adopted by the Commission must be automatically tolled pending a final resolution of such dispute. Specifically, the new procedures should not apply in any case where an incumbent has sought speedy redress before a court of competent jurisdiction, and there remains any live dispute over the incumbent's right to continue to serve the MDU, over ownership of any facilities on the premises of the MDU, or over the right of the incumbent to maintain its facilities on the MDU premises after expiration of the contract. Only after such disputes have been resolved with finality under local law (or where the statute of limitations for the enforcement of such a legal right has expired), can the Commission ensure that its new procedural mechanisms "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner."[25]

Yet the Commission's new rule, requiring an incumbent MVPD to file a lawsuit and receive a temporary restraining order or preliminary injunction within 45 days after it receives a termination notice from an MDU owner or else risk a presumptive "abandonment" of its legal rights, accomplishes just the opposite. Indeed, an incumbent MVPD is forced to go to court in virtually every situation, even if both parties agree that the issues and validity of claims are correctly in dispute and/or unclear. Not only is there no certainty that courts will be able to issue rulings on these disputes within 45 days, it is doubtful that such a requirement is the most productive alternative, considering the Commission's commitment not to destroy the valid property rights of incumbent MVPDs.[26] Moreover, prior to adoption of the Commission's rules, Time

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[25]Id. at ¶ 34.

[26]Id. Such a requirement is also beyond the Commission's jurisdiction. The Commission, as an (continued...)

Warner's experience reflects that the parties often were able to resolve such disputes through negotiation, and would go to court only as a last resort. The new approach will force the incumbent to sue first and negotiate later, directly increasing the burdens and costs imposed on all involved.

If the Commission is unwilling to toll its MDU inside wiring procedural rules in any case where the rights of the incumbent MVPD are being litigated, at a very minimum the 45 day rule should be abolished. The requirement that an incumbent obtain an injunction to avoid the applicability of the new rules within 45 days simply has no rational relationship to the other procedural rules adopted in the Order. For example, at 45 days the incumbent has already been forced to make an election among sale, removal or abandonment. If a sale has been elected, substantive negotiations may have taken place before the end of 45 days. If removal or abandonment has been elected, no further action need occur until after the expiration of the 90 day notice from the MDU owner. Should an injunction issued by a local court on day 46 have any less impact on the FCC's processes than an injunction issued on day 44? If an injunction is not obtained within 45 days, but a court later rules on the merits that the incumbent has a continuing contractual right to offer service to MDU residents, should the incumbent be deprived of its property rights because the FCC's procedures have allowed a new MVPD to use the home runs in the interim? The answers to these questions should be obvious. Section 76.804(c) of the Commission's rules should be revised to read as follows:

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[26](...continued)
administrative agency of the federal government, lacks the constitutional power to prescribe a period of time in which either a state court must issue a ruling in a case to which such court has subject matter jurisdiction, and such power is well beyond the Commission's statutory authority. Furthermore, the Commission does not have the authority to amend state statutes of limitation by forcing incumbent MVPDs to commence litigation on an expedited time schedule.

The procedures set forth in paragraphs (a) and (b) shall not be construed to affect the substantive contractual, statutory or common law rights of any incumbent provider to maintain its facilities on the premises of any MDU. The procedures set forth in paragraphs (a) and (b) shall be tolled at any time after the initial notice from the MDU owner if the incumbent provider obtains a court ruling or an injunction. The fact that the procedures in paragraphs (a) and (b) may have caused a displacement of the incumbent shall not affect the powers of a court to order a return to the status quo ante or other appropriate relief.

IV. Incumbent Providers Should Not Have To Negotiate A Sale Price For Home Runs Unless MDU Owner Agrees Up Front To Binding Arbitration If Negotiations Fail.

Under the building-by-building transition rules adopted in the Order, after receipt of a termination notice from the MDU owner, an incumbent has three options, to sell, abandon, or remove its wiring from the building.[27] If the incumbent elects to sell the wiring to the MDU owner (or alternative MVPD), it has 30 days in which to negotiate a sale price for the wiring with the MDU owner.[28] At the end of the 30 day period, if the parties have been unable to agree upon a price for the wiring, they can both agree to submit the pricing issue to binding arbitration.[29] However, the MDU owner can also unilaterally reject arbitration at the end of this negotiation period, in which case the incumbent provider has no further obligations under the FCC home run wiring disposition procedures.[30]

This rule unfairly tilts the process in the favor of the MDU owner, further increasing the likelihood that the incumbent provider will be deprived of fair compensation for its wiring and making it less likely that the sale price for home runs will be determined through marketplace negotiations. As noted above, if the incumbent elects to sell, and if the thirty day negotiation process fails to yield a mutually acceptable price, the MDU owner is under no obligation to agree

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[27] Order at ¶ 43.

[28] Id. at ¶ 46.

[29] Id.

[30] Id.

to binding arbitration. Thus, the MDU owner has no incentive to bargain in good faith during the 30 day negotiation period. If the incumbent offers a price favorable to the MDU owner, the MDU owner can agree to buy. If not, the MDU owner can walk away and avoid binding arbitration. To avoid this unfair bargaining leverage, Time Warner suggests the following modification to the FCC procedures.

Upon receipt of the 90 day termination notice from the MDU owner, the incumbent may notify the MDU owner within thirty days that the incumbent is willing to sell the home runs, and willing to submit to binding arbitration if the negotiations fail. Thus, the incumbent has clearly made a commitment to sell its home runs at a reasonable price, as determined either through negotiations or arbitration. Thus, the MDU owner should be required within five days to commit to purchasing the home runs at a price determined either through negotiations or arbitration. If the MDU owner is not interested in buying the home runs, the incumbent should then have the option of removal or abandonment. But if the MDU owner (or alternate provider) is truly willing to purchase the home runs, the above-described process will assure that a sale can be accommodated between a willing buyer and a willing seller. Moreover, both sides will have a greater incentive to bargain in good faith during the thirty day negotiation period, knowing that they both are committed to binding arbitration if negotiations are unsuccessful. Otherwise, the thirty day negotiation process might be nothing more than a waste of time and energy.

V. The FCC Cannot Force An Incumbent MVPD To Allow Competitors To Install Wiring In Its Molding Without Compensation.

In the Order, the Commission adopted a new rule which permits an alternative MVPD to install its own wiring within an incumbent provider's existing molding within an MDU, even over the incumbent provider's objection, where the MDU owner agrees that there is sufficient space in

the molding and the MDU owner gives its affirmative consent.[31] While the alternative MVPD is required to pay any and all installation and restoration costs, it is not required to compensate the incumbent provider for the use of its molding.[32]

Where an incumbent provider owns the molding or has contracted with the MDU owner for the exclusive right to occupy the moldings or conduits, such a rule constitutes an unconstitutional taking of the incumbent MVPD's property, and is outside the jurisdiction of the Commission under the Communications Act.[33] The Commission's assertion that such a rule does not constitute a taking because the empty spaces in the molding do not belong to the owner of the molding is contrary to the great weight of precedent regarding the Takings Clause of the Fifth Amendment.[34] The plain fact is that such required sharing without compensation is an uncompensated, permanent occupation of an incumbent provider's property, and is therefore unconstitutional.

An analogous situation is the pole attachment fee levied by telephone companies against cable operators for the use of their poles. Just because a telephone pole is located on non-telephone company owned private property, it does not mean that the telephone company can not charge unaffiliated third parties for the right to attach their wiring to the pole. Likewise, just because an incumbent provider's property is located within the confines of an MDU, it does not mean that its property rights in the molding are in any manner extinguished, and that the incumbent should be

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[31] Order at ¶109.

[32] Id.

[33] See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994); Time Warner Comments at 54, 63; see also Nixon v. United States, 979 F.2d 1269, 1285-86 (D.C. Cir. 1992); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987).

[34] See Loretto v. Teleprompter Manhattan Cable TV Corp., 458 U.S. 419, 426 (1982) ("[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.")